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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 35305**

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**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –  
PETITION FOR DECLARATORY ORDER**

**REBUTTAL EVIDENCE AND ARGUMENT OF THE  
TEXAS MUNICIPAL POWER AGENCY**

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The Texas Municipal Power Agency ("TMPA"), pursuant to the decisions of the Surface Transportation Board ("Board" or "STB") served on December 1, 2009 and May 11, 2010 in the above-captioned docket, hereby files its Rebuttal Evidence and Argument.

**I. BACKGROUND**

In its Opening Evidence, TMPA stated that it is currently paying transportation rates to BNSF Railway Company ("BNSF") pursuant to a 20-year prescribed rate from the rate reasonableness case *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42056. TMPA Opening at 2 (filed March 16, 2010). The Board's decision from that case reveals the Board considered all costs associated with railbed maintenance and fouled ballast when developing the prescribed rate. TMPA noted that these costs show that the prescribed rate already includes coal dust remediation and, therefore, TMPA should not be responsible for any costs associated with compliance with the BNSF coal dust tariff at the heart of this proceeding. TMPA Opening at 2-6. TMPA asked the Board for a brief statement to this effect if the Board finds BNSF's tariff reasonable. TMPA Opening at 6. At the

very least, TMPA requested that the Board remind BNSF that BNSF bears the burden of proof to change the amount paid by TMPA for transportation during the 20-year period of the prescription. TMPA Opening at 6.

In its Reply Evidence, BNSF did not address the applicability of the coal dust tariff to TMPA's prescribed rate, but merely stated that this issue "has no place in this proceeding." BNSF Reply at 36 (filed April 30, 2010).

## **II. REBUTTAL**

TMPA agrees with and supports the argument and evidence submitted by the other shippers and shipper groups, who have shown that the BNSF tariff is an unreasonable practice. If the Board finds the BNSF action reasonable or otherwise allows BNSF to implement Items 100 and 101 of BNSF-6041-B ("the coal dust tariff"), the Board should also state that the tariff cannot be applied against TMPA during the rate prescription period prescribed under Docket No. 42056. Through its past correspondence with TMPA, BNSF has already expressed its belief that the coal dust tariff should apply to TMPA. See Exhibit 1 (letter from BNSF to TMPA, dated March 20, 2009, and produced at TPA0000171). If the Board says nothing about TMPA in its decision, while also finding BNSF's action reasonable, then BNSF will inevitably treat the Board's decision as meaning that the tariff can apply to TMPA. Therefore, TMPA disagrees with BNSF's claim that this issue "has no place" in the current proceeding.

TMPA is currently paying BNSF under a rate prescribed after a lengthy proceeding evaluated all costs of transportation that were considered by the Board in prescribing the rate. Application of the coal dust tariff to TMPA would impermissibly raise the costs incurred by TMPA, increasing the amount that TMPA must pay for the same transportation after TMPA had already been forced to expend significant costs in obtaining a Board determination that BNSF's

rates were unreasonable. Under BNSF's position, TMPA would then be forced to go back to the Board and challenge the BNSF increase in costs for this transportation; however, under the Board's procedures, BNSF has the burden of proof to show that the TMPA prescribed rate could be increased. *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 67 (served Oct. 30, 2006) (Board takes "into account the considerable time and expense required to adjudicate the reasonableness of a rate under the SAC test" when evaluating whether a party has "justified" reopening). The proper way for BNSF to seek a change in the prescribed rate or to assess new and additional costs to TMPA is through a petition to reopen at the Board under 49 CFR § 1115.4. If the Board approves the BNSF coal dust tariff without stating that TMPA is exempted, it would impermissibly shift the burden of proof to TMPA to file an action asking the Board to prohibit BNSF from shifting coal dust remediation costs to TMPA since BNSF has already provided notice to TMPA that TMPA will be subjected to the tariff.

In short, this forum is exactly the right place for the Board to address the TMPA issue. Without a short statement from the Board on the inapplicability of the coal dust tariff to the prescribed rate transportation of TMPA, where the Board has already considered such costs, the burden of proof could inequitably and illegally be shifted to TMPA for any future proceeding at the Board about the tariff's application to prescribed rates.

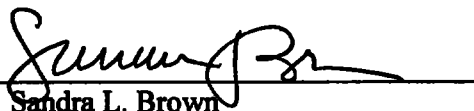
While the applicability of the coal dust tariff to TMPA is an appropriate topic for this proceeding, TMPA agrees that there are related issues that are not germane to the coal dust proceeding. For example, TMPA also disagrees with BNSF's recent attempt to assess demurrage charges against BNSF trains in service to TMPA. Like the coal dust issue, these demurrage charges encompass costs already factored into the prescribed rate in Docket No. 42056 given the specific circumstances of the traffic (where detailed operational considerations

were used to develop the TMPA prescribed rate including how trains were delivered and the length of time the trains would be at the plant). Nonetheless, TMPA has not raised the demurrage issue in this proceeding because it is unrelated to coal dust even though BNSF's action is the same – attempting to unilaterally raise the rates or costs paid by TMPA for the transportation service that was found unreasonable by the Board in 2003 and prescribed for a 20-year period.

### **III. CONCLUSION**

TMPA respectfully requests that the Board's ultimate decision in this case should include a statement that any costs associated with the provisions of a "coal dust tariff" such as Items 100 and 101 of BNSF-6041-B cannot be forced onto TMPA during the 20-year prescribed rate period because such costs were already included in the prescribed rate set by the Board in STB Docket No. 42056.

Respectfully submitted,



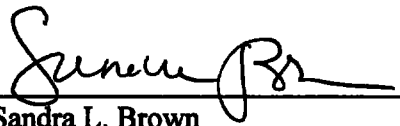
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*Attorneys for Texas Municipal Power Agency*

June 4, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of June 2010, a hard copy of the foregoing was served via first-class mail, postage prepaid, on all parties of record and an electronic copy was e-mailed to BNSF counsel and most other parties of record.

  
Sandra L. Brown

# EXHIBIT 1



Stevan B. Bobb  
Group Vice President  
Coal Marketing

BNSF Railway Company

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Fort Worth, Texas 76131-2830  
P.O. Box 961051  
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Stevan.Bobb@bnsf.com

March 20, 2009

Mr. Gage Dahmann  
Fuels Manager  
Texas Municipal Power Agency  
P.O. Box 7000  
Bryan, TX 77805

Re: Coal Dust Mitigation

Dear Gage:

BNSF recently issued a new operating rule applicable to the Powder River Basin Joint Line consistent with BNSF's responsibility to maintain this vital line to serve you and meet your coal shipping needs from mines in the Powder River Basin (PRB). Our experiences in 2005 and subsequent engineering review have made it clear that coal dust released from coal trains on the PRB Joint Line has the potential to compromise the track structure and adversely impact service reliability and consistency.

BNSF has established an operating rule that sets limits on the amount of coal dust that can be released from a unit coal train loaded on the Joint Line. The rule specifies certain profiling parameters already largely adopted by mines loading coal on the Joint Line, and otherwise leaves to the discretion of you, the customer, and your agent, the mine loading rail cars, to determine how best to control the release of coal dust. The rule provides:

Effective immediately, trains handling cars loaded with coal moving from individual mine origins on the Joint Line shall be profiled in accordance with published template drawing number 565000 on the BNSF website ([www.bnsf.com](http://www.bnsf.com)). The template can be found by accessing the following tabs: Customer Tools, Equipment Information, Loading Diagrams, Coal.

As soon as practicable, trains handling cars loaded with coal moving from individual mine origins on the Joint Line shall not emit more than an Integrated Dust Value (IDV.2) of 300 units in order to enhance retention of coal in rail cars. An IDV.2 unit is a measure of the volume of coal dust coming off of the coal train over its entire length. Profiling and any products or appurtenances shall be applied in accordance with manufacturer's recommendations, where appropriate.

Any product, device or appurtenance utilized to control the release of coal dust shall not adversely impact employees, property, locomotives or owned rail cars.

BNSF has installed coal dust monitoring stations on the PRB Joint Line to monitor passing coal trains. BNSF served mines and PRB coal customers will receive periodic reports identifying their particular trains that exceed the parameters contained in the operating rule.

It is BNSF's expectation that mines and PRB coal customers will voluntarily adopt whatever measures are necessary to control the release of coal dust. This position is consistent with BNSF's expectation that all customers load their commodity in rail cars in such a way that it is not released during transit. We will work with you to address any particular issues in reaching our goal of efficient, reliable coal transportation. Please contact me if you wish to discuss this further.

Sincerely,

Stevan B. Bobb

TPA0000171